STATEMENT OF

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Subcommittee on Environment and Hazardous Materials

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Mr. Chairman, on behalf of the private sector solid waste management industry, I appreciate the opportunity to testify today on proposed interstate waste legislation. I am Bruce Parker, Executive Vice President of the National Solid Wastes Management Association (NSWMA). NSWMA represents private sector companies that collect and process recyclables, own and operate compost facilities and collect and dispose of municipal solid waste. NSWMA members operate in all fifty states.

The solid waste industry is a $43 billion industry that employs more than 350,000 workers. We are proud of the job we do and proud of the contribution our companies and their employees make in protecting the public health and the environment. America has a solid waste management system that is the envy of the world because of our ability to guarantee quick and efficient collection and disposal of trash in a manner that fully conforms with state and Federal waste management laws and regulations.

Our members provide solid waste management services in a heavily regulated and highly competitive business environment. Like all businesses, we are keenly interested in proposals, such as restrictions on the interstate movement of MSW, that would change that regulatory or competitive environment, increase the cost of waste disposal and threaten the value of investments and plans we have made in reliance on the existing law.

The message I want to leave with you is this: restricted borders have no legitimate place in managing trash or any other product in our economy. They do not make economic or environmental sense. They are contrary to the concept of open borders; contrary to the evolution to bigger, better, more environmentally sound disposal facilities; contrary to our desire to keep disposal costs for taxpayers low, and contrary to the trend toward more innovative, flexible, waste management facilities.

In the balance of this statement, I will share with you our reasons for concern and opposition to H. R. 1213, the "Solid Waste Interstate Transportation of 2001", H.R. 1214, the "Municipal Solid Waste Flow Control Act of 2001" and H. R. 1927, the "Solid Waste International Transportation Act of 2001". I will discuss the background and context as we see it, and the flaws in the proposed legislation. In particular, detailed comments on H.R. 1213 are set forth in an attachment to this statement.

The Scope of Interstate Movements

Interstate waste shipments are a normal part of commerce. In spite of all the impassioned language you have heard from a few states denouncing

garbage that moves across state lines, the reality is simple: most states import and export garbage and none are harmed in the process.

According to "Interstate Shipment of Municipal Solid Waste: 2001 Update", which was released by the Congressional Research Service (CRS) in mid-July, 30 million tons of MSW crosses state borders. This equals approximately 13% of the garbage generated in the United States and about 18% of the garbage disposed of in the United States.

These shipments form a complex web of transactions that often involve exchanges between two contiguous states in which each state both exports and imports MSW. In fact, the vast majority of MSW, more than 80%, goes to a disposal facility in a neighboring state. According to the CRS report, 24 states, the District of Columbia and the province of Ontario exported more than 100,000 tons of solid waste last year. At the same time, 28 states imported more than 100,000 tons. Fifteen states imported and exported more than 100,000 tons.

The CRS report documents interstate movements of MSW involving 49 of the 50 states. Forty-six states, the District of Columbia and one Canadian province export and 42 states import. Attached is a map showing the movement of solid waste among the states based on the data in the CRS report.

Moreover, while some states are the biggest exporters based on tonnage, several small states and the District of Columbia are highly dependent on waste exports. In addition to Washington, DC, which exports all of its MSW, Maryland, New Jersey and Vermont export the highest percentage of solid waste. The reality is that MSW moves across state lines as a normal and necessary part of an environmentally protective and cost effective solid waste management

system. Like recyclables, raw materials and finished products, solid waste does not recognize state lines as it moves through commerce.

CRS cites a number of reasons for interstate movements. These include enhanced disposal regulations and the subsequent decline in facilities. In addition, CRS notes that in larger states "there are sometimes differences in available disposal capacity in different regions with the state. Areas without capacity may be closer to landfills (or may at least find cheaper disposal options) in other states."

The Role of Regional Landfills

The CRS report notes that the number of landfills in the US declined by 51% between 1993 and 1999 as small landfills closed in response to the increased costs of construction and operation under the Resource Conservation and Recovery Act (RCRA) Subtitle D and state requirements for more stringent environmental protection and financial assurance. The number of landfills in the early 1990s was nearly 10,000 while today there are about 2,600 and the total number continues to decline as small landfills close, and communities in "wastesheds" turn to state-of-the-art regional landfills that provide safe, environmentally protective, affordable disposal.

Construction and operation of such facilities, of course, requires a substantial financial investment. By necessity, regional landfills have been designed in anticipation of receiving a sufficient volume of waste from the wasteshed, both within and outside the host State, to generate revenues to recoup those costs and provide a reasonable return on investment.

It was widely recognized that the costs to most communities of Subtitle D-compliant "local" landfills were prohibitive. The development of regional landfills was not only entirely consistent with all applicable law, it was viewed and promoted by Federal and State officials and policy as the best solution to the need for economic and environmentally protective disposal of MSW.

These regional landfills provide safe and affordable disposal as well as significant contributions to the local economy through host fees, property taxes, and business license fees. Additional contributions to the communities include free waste disposal and recycling services, and in some cases assumption of the costs of closing their substandard local landfills. These revenues and services enable the host communities to improve and maintain infrastructure and public services that would otherwise not be feasible.

Both the Public and the Private Sectors Oppose Interstate Restrictions

NSWMA is not alone in opposing restrictions on interstate waste. The Solid Waste Association of North America (SWANA), which represents public sector solid waste managers, also opposes these restrictions. At its mid-year meeting last summer, SWANA's International Board of Directors voted unanimously to approve a policy statement that supports "the free transboundary movement of solid waste".

Public sector waste managers and private sector waste management companies agree that they can't do their job and protect the public health and the environment while having their hands tied by artificial restrictions based on state lines.

Host Communities Benefit

MSW also moves across state lines because some communities invite it in. Many communities view waste disposal as just another type of industrial activity, as a source of jobs and income. As noted above, these communities agree to host landfills and in exchange receive benefits, which are often called host community fees, that help build schools, buy fire trucks and police cars, and hire teachers, firemen and policemen and keep the local tax base lower.

The Broader Context

The proposed legislation before you would radically disrupt and transform the situation I have described. For that reason, as well as the precedential nature of some of the provisions, let me suggest that you consider those bills in a broader context.

The applicability of the Commerce Clause to the disposal of out-of-State waste is well established by a long line of U.S. Supreme Court decisions spanning more than a quarter of a century. As you probably know, the original decision protected Pennsylvania's right to export its garbage to a neighboring state. The Court has consistently invalidated such restrictions in the absence of Federal legislation authorizing them.

Throughout this period, private sector companies did what businesses do: they made plans, invested, wrote contracts, and marketed their products and services in reliance on the rules which clearly protected disposal of out-of-State MSW from restrictions based solely upon its place of origin.

In this fundamental sense, the interstate commerce in waste services is like any other business, and proposed legislation to restrict it should be evaluated

in the broader context of how you would view it if its principles and provisions were made applicable to other goods and services, rather than just garbage.

Consider, for example, parking lots. Suppose a State or local government sought Federal legislation authorizing it to ban, limit, or charge a differential fee for parking by out-of-State cars at privately owned lots or garages, arguing that they were using spaces needed for in-State cars, and that the congestion they caused was interfering with urban planning, etc. Or suppose they asked for authority to tell privately owned nursing homes or hospitals that they couldn't treat out-of-State patients because of the need to reserve the space, specialized equipment, and skilled personnel to meet the needs of their own citizens. Similar examples can easily be identified--commercial office space for out-of-State businesses, physicians and dentists in private practice treating out-of-State patients, even food or drug stores selling to out-of-State customers.

I would hope that in all of these cases, you would respond to the proponents of such legislation by asking a number of questions before proceeding to support the restrictions: What kind of restrictions do you want? Are they all really necessary? Can you meet your objectives with less damaging and disruptive means? What about existing investments that were made in reliance on the ability to serve out-of-State people? What about contracts that have been executed to provide that service? Would authorizing or imposing such restrictions be an unfunded mandate on the private sector providing those services, or on the public sector outside the State that is relying on them? Would such restrictions result in the diminution of the value of property purchased in reliance on an out-of-State market, and thereby constitute a "taking"? Will the

restrictions be workable and predictable? I respectfully suggest that you ask the same questions about the proposed legislation involving restrictions on interstate MSW.

The Proposed Legislation

The proposed legislation before you (H.R. 1213, H.R. 1214 and H.R. 1927) fail to protect host agreements, investments or contracts. None of the bills preserves an opportunity to enter and grow in a market that demands economic and protective waste disposal. And none of the bills provides predictability about the rules that will apply to interstate shipments of waste. The array of discretionary authorities for Governors to ban, freeze, cap, and impose fees, and then change their minds over and over again, promises to result in chaos and a totally unpredictable and unreliable market and waste disposal infrastructure. In the worst case, hasty state action to ban or limit imports could lead to a public health crisis in exporting states if their garbage has no where to go. As noted earlier, attached to this statement is a detailed analysis of the many flaws that I see in the provisions of H. R. 1213.

Finally, let me comment briefly on H.R. 1214, which would restore flow control authority, and on H.R. 1927, which would allow states to prohibit the importation of MSW form Canada and Mexico, signatories with the United States to the North American Free Trade Agreement.

Flow Control

NSWMA opposes restoration of flow control because it's too late to put Humpty Dumpty back together again. In the 7 years since the *Carbone* decision, landfills and transfer stations have been constructed, trucks have been bought,

people have been hired, contracts have been written, and both the consumers and providers of waste services have experienced the benefits of a competitive market. These investments and arrangements cannot be undone, nor should they be. The facilities that benefited from an uncompetitive monopolization of local solid waste management have learned to compete in a free market. They have become more efficient and competitive as a result of the rigors of the free market system. Why would anyone want to replace a competitive system with uncompetitive monopolies?

Prohibiting the Importation of Canadian Waste Violates NAFTA

H. R. 1927, the Solid Waste International Transportation Act of 2001, would allow states to ban solid waste from other countries. This legislation is aimed directly at Canadian exports. As such, it is inconsistent with the national treatment requirement of the North American Free Trade Agreement (NAFTA) which provides that Mexico, Canada and the United States must treat goods from one another in a manner that is no less favorable than that accorded to domestically produced like products. This requirement of national treatment extends to states.

MSW may not be everyone's favorite commodity, but it is protected by the same free trade provisions that protect paper and cars and television sets. If we could close our borders to Canadian solid waste, what would prevent Canada from closing its borders to American hazardous waste? American exports of hazardous waste to Canadian disposal facilities have increased dramatically over the last five years. If Michigan can ban Canadian MSW, should not the Canadians be allowed to ban Michigan hazardous waste?

Conclusion

Thank you, Mr. Chairman. That concludes my statement.

Attachments

HR 1213 would abrogate contracts, diminish the value of private property and investments, void decisions by local governments, increase the cost of waste disposal, and disrupt existing and planned arrangements for waste disposal services. These problems are illustrated by the provisions discussed below in the order in which they appear in the bill.

Federal Presumptive Ban: Proposed new section 4011(a) imposes a Federal ban on receipt of out-of-State (OOS) municipal solid waste (MSW) unless the landfill or incinerator is exempted from the ban (1) as a result of a Host Community Agreement (HCA) approving receipt of OOS MSW, (2) because it has a permit authorizing its receipt, or (3) because it has entered into a binding contract for a specific quantity of OOS MSW. All three of these purported exemptions are either much more limited than they appear or entirely illusory, as discussed below.

The ban is apparently effective immediately upon enactment of the new section. As a result, every community in the nation that hosts a facility without an HCA, permit or contract for receipt of OOS MSW will be required by Federal law to expend the time and money to conclude an HCA in accordance with the elaborate and extensive requirements of proposed new section 4011(c), if it wants the facility to be able to receive OOS waste. This Federal requirement to spend time and money would be imposed even if the community had no desire to limit receipt of OOS MSW. The immediate effectiveness of the ban means that the flow of OOS MSW to facilities in those communities will be immediately and entirely cut off until they conclude the HCA process.

Moreover, even those communities that have concluded an HCA or host facilities that have permits or contracts will be at risk as well, since there is no provision for resolving potential disputes about whether the facility is exempt from the ban. What agency enforces the ban? What is the penalty for violation of the ban? What courts have jurisdiction over disputes about the validity of HCAs, permits, or contracts? What happens to the flow of waste while the dispute is pending in the courts?

Definition of "Complies" and "Compliance": The exemptions from the federal ban are contingent on the facility being in "compliance" with Federal and State laws and regulations (subsection (e)) and with all of the terms and conditions of a permit authorizing receipt of OOS MSW (subsection (d)(1)(A)), as well as the terms and conditions of the HCA (subsection (b) and (c)). This is a giant loophole, since the terms are not defined. Unless they are adequately defined, arbitrary and capricious action by State officials could lead to closure of a facility to all OOS MSW because of a litter violation, a one-day delay in filing of a required report, or other minor infraction. Moreover, there is no mechanism for

disputing the alleged non-compliance or any requirement that it be proven. A mere allegation of non-compliance would appear to suffice.

State Laws on HCAs: Proposed new subsection (c)(6) would authorize states to enact laws governing the entry by an affected local government into an HCA. There is no requirement that such laws be consistent, or not inconsistent, with the provisions of the section. Thus, for example, a State might enact a law requiring approval of a proposed HCA by the governor or legislature of that State, or impose other requirements that would effectively preclude HCAs.

Contract Protection: Receipts of OOS MSW under certain legally binding contracts entered into before March 27, 2001 are explicitly protected from the ban by subsection (d)(1)(B)). In addition to the fact that this means that no subsequent contracts would be protected, even if the bill is not enacted for more than a year, the pre-March 2001 contracts will be protected **only if the receiving landfill or incinerator on the date of enactment "has permitted capacity actually available" for the OOS MSW covered by the contract.** Since sound business planning and cash flow considerations will ensure that this will almost never be the case, the protection is illusory. Moreover, even if there is permitted capacity for the total volume of waste to be received during the life of the contract, the subsection establishes a new federal law of contracts that denies protection to contract renewals and extensions, even if they are not "novations" of the contract, and even if they would be protected under state law.

Limitations on Amount of Waste Received: Proposed new subsection (f) would allow a State or affected local government to freeze at 1993 levels the amount of OOS MSW that an unprotected facility may receive. These are the facilities that are exempt from the ban because they received OOS MSW in 1993, but they do not have the required HCAs or permits authorizing receipt of OOS MSW.

A fundamental question arises as to whether a State could freeze receipts at facilities that do not have the requisite HCAs, permits, or contracts that would exempt them from the ban. The text of the subsection (a) Federal ban applies to all facilities unless they are specifically exempted. Thus, what facilities would be subject to the freeze rather than the ban?

In addition, for those facilities that are subject to the freeze, as is the case with exemptions from the ban, the exemptions are more apparent than real because a facility with an HCA is protected only if it had permitted capacity at the time of entering into the HCA to receive all of the OOS MSW authorized by the HCA (subsection (f)(B)(ii)). This is a null set. **Virtually all facilities with HCAs will be subject to the freeze.**

The owner or operator of the facility must be able to document the "identity of the generator" of OOS MSW that was received in 1993. Assuming that this requires the names of each person from whom such waste was collected, it

imposes an impossible burden and guarantees that all facilities will be subject to the ban, not the freeze.

Needs Determination*:* Subsection (g)(1) **guts all of the protection** granted by other provisions of the bill for facilities with HCAs, permits, or "naked grandfather" status to receive OOS MSW by giving State permitting officials the power to deny permits for construction of new facilities and expansions of existing facilities if the officials determine that there is no local or regional need for the facility. Subsection (k) "immunizes" such a denial from lawsuits based on the Commerce Clause.

The effect of this text would be to allow a State to discriminate against OOS MSW by denying permits for landfills or incinerators that would receive waste from outside the State, since the local area or region in the State would not "need" a facility for that out-of-State waste. This would make a nullity of any protection that might otherwise be gained from the rest of the bill, In the midst of widespread efforts to eliminate barriers to entry so as to promote competitive markets in virtually every sector of the economy, this proposal would move in exactly the opposite direction with **centralized planning that will stifle competition and increase the costs of waste disposal**. The existing facility would be given a monopoly, free from competition from "unneeded" capacity. Moreover, how will the central planners pick which facility gets a permit when and if they decide that new capacity is needed? .

Caps*:* Subsection (g)(2) further erodes the protections ostensibly secured by other provisions of the bill. It authorizes any State to adopt a law that caps the amount of OOS MSW that may be received under permits issued after enactment at 20 percent of all MSW received annually. This would be a severe problem for regional landfills and incinerators for which there would simply not be sufficient in-State waste to sustain adequate operations.

Subsection (b)(2) exempts from the caps receipts at facilities that entered into HCAs prior to enactment, but **only if** the HCA specified the quantity of OOS MSW that may be received. Since few, if any, HCAs specify an amount, the effect of this paragraph is to deny any protection to pre-enactment HCAs. Moreover, since it makes no mention of post-enactment HCAs, it appears that they would be of no value in escaping a 20 percent cap, even if they did specify an amount. The combined effect of these provisions is to eliminate any reason to negotiate HCAs after enactment, and to so severely curtail operations as to eliminate existing regional facilities with HCAs.

Authority Based on Recycling Programs: Proposed subsection (h) allows States with comprehensive recycling programs to freeze receipts of OOS MSW at the levels facilities received in 1995, the year before Wisconsin's law was declared unconstitutional. Here again, facilities with HCAs are exempt **only if** they had, at the time of entering the HCA, permitted capacity to receive the waste authorized by the HCA—a null set.

Affected Local Government: Subsection (m)(1) defines the "affected local government" that is authorized to enter into an HCA and thereby exempt a facility from the ban and perhaps the freeze on its receipt of OOS MSW.

The text defines affected local government as the planning entity in all cases unless there is none authorized by State law, rather than the elected officials of the city, town, etc. with whom HCAs have traditionally been entered. This failure to recognize any but the planning body is artificial and a radical departure from all previous versions of proposed legislation on this subject, including the texts of H.R. 4779 that passed the House September 28, 1994, S. 2345 that passed the Senate September 30, 1994, S. 2345 that passed the House by unanimous consent on October 7, 1994, and S. 534 that passed the Senate on May 16, 1995. All of these texts allowed HCAs with either entity before enactment.

Here again, the effect of this provision would be to **invalidate existing HCAs** that have been concluded in good faith with the elected officials of local governments before enactment of any legislation. Their decisions on behalf of the people most directly affected by OOS MSW would be vetoed by the Federal legislation requiring that the time and money spent on public hearings and deliberations be cast aside, and that they effectively beg for approval from the MSW planning body to decide and determine their own best interests.

Construction and Demolition Waste*:* The subsection (m)(3) definition of "MSW" includes C&D waste from "structures".

The effect of this text would be to subject all C&D waste to an unworkable regime that will increase the costs of its disposal for the following reasons:

- "Structures" is not defined. Is debris from a tollbooth on a highway from a "structure"? Is the pavement at a drive-in food store or gas station, or the parking lot for an apartment building or store included as debris from "structures" when they and their associated buildings are constructed, repaired, or demolished? What about mixed loads from those sources, or from the sites of the Florida hurricane, Los Angeles earthquake, or Midwest floods?

- How does the landfill owner know whether the debris was from a "structure" and covered by a ban or limit when it arrives in a truck at the landfill?

TSCA-Regulated Waste: Subsection (m)(3) excludes from the definition of the MSW covered by the bill hazardous waste listed under section 3001, but waste regulated under the Toxic Substances Control Act is not excluded. The failure to expressly do so suggests that receipt of OOS TSCA-regulated waste at any landfill or incinerator is subject to the bans and limits of the bill.

Industrial Waste: In a similar departure from all previous approaches to this problem, industrial, non-hazardous waste is not excluded from coverage under the bill. Subsection (m)(3)(B)(v) excludes only that industrial waste that is sent to a "captive" facility owned by the generator or its affiliate. All other non-hazardous industrial waste generated by manufacturing or industrial processes would be subject to the bans and limits of the bill. The result would be a drastic reduction in the amount of industrial waste moving in competitive interstate commerce, and a **dramatic increase in the costs of disposal.**